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## Multilingual legislative drafting in Swiss cantons: Burden or blessing?

Uhlmann, Felix ; Höfler, Stefan

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# Multilingual Legislative Drafting in Swiss Cantons: Burden or Blessing?

Felix Uhlmann<sup>1</sup> and Stefan Höfler<sup>2</sup>



## Abstract

*This article is about drafting multilingual legislative texts in three cantons of Switzerland that have German and French as their official languages and a fourth canton that has German, Italian and Romansh as its official languages. Three drafting models are variously used in these cantons: co-drafting, co-revision and co-editing. The article describes each of these models and assesses their effects both in terms of the volume (quantity) and the quality of legislation produced.*

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## **Introduction**

It is quite well known that, on the federal (national) level, Switzerland has three official languages: German, French and Italian.<sup>3</sup> A fourth language, Romansh, is considered a national language but does not have the status of an official language.<sup>4</sup> All three languages are equally authentic: all legislation is produced in German, French and Italian and each language version of a legislative text has the same legal force.<sup>5</sup> What is less commonly known is that multilingual legal systems also exist on the cantonal (state) level: three cantons (Berne, Fribourg, Valais) use German and French as official languages and one canton (Grisons) uses German, Italian and Romansh.<sup>6</sup>

The models of legislative drafting employed in multilingual systems may be distinguished by the stage at which the second (and third) language comes into play: It may happen at the stages of conceptualization and composition (co-drafting), during the revision of the texts (co-revision) or only for the final editing (co-editing).

This paper will discuss the different models implemented by the Swiss Confederation and in the aforementioned cantons, identify their advantages and shortcomings and compare them to legislative drafting in cantons with only one official language. It will explore the impact of multilingualism on the quality and the amount of legislation.

## **Background**

One should start out with some statistical background. Switzerland is small, and the cantons (states) of Switzerland are obviously even smaller. Switzerland has roughly 8.5 million inhabitants; the cantons with more than one official language have around one million (Berne) and around 200'000 to 300'000 (Fribourg, Grisons, Valais), respectively. German is the main language spoken in the Confederation; it has roughly three times as many speakers as French and seven to eight times as many as Italian. In the cantons of Berne and Grisons, German is even more dominant (compared to French in Berne and to Romansh and Italian in Grisons). In the remaining two multilingual cantons (Fribourg and Valais), French is the

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<sup>3</sup> Article 70(1) BV (Bundesverfassung der Schweizerischen Eidgenossenschaft of 18 April 1999, SR 101 – Federal Constitution of the Swiss Confederation).

<sup>4</sup> Article 70(1) BV (Bundesverfassung der Schweizerischen Eidgenossenschaft of 18 April 1999, SR 101 – Federal Constitution of the Swiss Confederation).

<sup>5</sup> Article 14(1) PublG (Bundesgesetz über die Sammlungen des Bundesrechts und das Bundesblatt of 18 June 2004, Publikationsgesetz, SR 170.512 – Federal Act on the Compilations of Federal Legislation and the Federal Gazette, Publications Act).

<sup>6</sup> Article 6 KV/Bern (Verfassung des Kantons Bern of 6 June 1993, SR 131.212 – Constitution of the canton of Berne), Article 6 KV/Freiburg (Verfassung des Kantons Freiburg of 16 May 2004, SR 131.219 – Constitution of the canton of Fribourg), Article 3 KV/Graubünden (Verfassung des Kantons Graubünden of 18 May/14 September 2003, SR 131.226 – Constitution of the canton of Grisons), Article 12 KV/Wallis (Verfassung des Kantons Wallis of 8 March 1907, SR 131.232 – Constitution of the canton of Valais).

dominant language: it is spoken by approximately twice as many inhabitants as German (cf. Fig. 1).

	Total	German	French	Italian	Romansh
Switzerland	6'907'818	<b>4'424'920</b>	1'567'197	581'381	(40'394)
Berne	854'618	<b>724'055</b>	88'335		
Fribourg	250'113	69'583	<b>170'378</b>		
Grisons	167'918	<b>125'468</b>		22'405	26'702
Valais	279'810	71'397	<b>189'523</b>		

**Figure 1:** Inhabitants (15 years and older) and Main Languages, Federal Statistical Office, 2015

From a legal standpoint, it is undisputed and usually granted by the respective constitution that all official languages are equal.<sup>7</sup> Courts often turn to the second or third language in case of ambiguous wording.<sup>8</sup> It should also be noted that the question of official languages in the legislative process is not a politically charged issue. While there have been numerous decisions by the Swiss Supreme Court on the use of languages in schools,<sup>9</sup> on billboards<sup>10</sup> and in corresponding to authorities,<sup>11</sup> to our knowledge so far there has been no Supreme Court case that concerned the process of legislation.

Swiss legislation is predominantly prepared by the administration as part of the executive branch. The civil servants are not professional legislative drafters, but governmental lawyers

<sup>7</sup> For the legal status of Romansh in the Federal Constitution see FRANÇOIS AUBERT/PASCAL MAHON, *Petit commentaire de la Constitution fédérale de la Confédération suisse* du 18 avril 1999, Schulthess, Zurich/Basel/Geneva, 2003, Article 70 comment 2-8; EVA MARIA BELSER/BERNHARD WALDMANN, in Bernhard Waldmann/Eva Maria Belser/Astrid Epiney (eds.), *Bundesverfassung, Basler Kommentar*, Helbing Lichtenhahn, Basel, 2015, Article 70 comment 17-24; GIOVANNI BIAGGINI, *Bundesverfassung der Schweizerischen Eidgenossenschaft, Kommentar*, Orell Füssli, Zurich, 2007, Article 70 comment 3-8; REGULA KÄGI-DIENER, in Bernhard Ehrenzeller/Benjamin Schindler/Rainer J. Schweizer/Klaus A. Vallender (eds.), *Die schweizerische Bundesverfassung, St. Galler Kommentar*, Schulthess/Dike, Zurich/Basel/Geneva/St. Gallen, 2014, Article 70 comment 17-26; RAINER J. SCHWEIZER/JÉRÔME BAUMANN/JAN SCHEFFLER, *Grundlagen und Verfahren der mehrsprachigen Rechtsetzung im Bund*, in Rainer J. Schweizer/Marco Borghi (eds.), *Mehrsprachige Gesetzgebung in der Schweiz*, Dike, Zurich/St. Gallen, 2011, p. 19 f.

<sup>8</sup> See ANDREAS LÖTSCHER, "Multilingual Law Drafting in Switzerland," in Günther Grewendorf/Monika Rathert (eds.), *Formal Linguistics and Law*, (De Gruyter, Berlin, 2009), at 379ff.

<sup>9</sup> See, for example, BGE 139 I 229; BGE 125 I 347; BGE 122 I 236; BGE 100 Ia 462; BGE 91 I 480.

<sup>10</sup> See, for example, BGE 116 Ia 345.

<sup>11</sup> See, for example, BGE 136 I 149; BGE 121 I 196; BGE 110 II 401; BGE 106 Ia 299.

with some special knowledge and practice in legislative drafting.<sup>12</sup> Draft laws are transmitted to Parliament in all official languages, which means that the process of translation mainly takes place during the preparatory work within the administration.

### **Co-drafting, Co-revision, Co-editing**

In the drafting of multilingual legislation, translation may come into play at different stages of the process: during the stage of conceptualization and composition (co-drafting), during the revision of the texts (co-revision) or only for the final editing (co-editing).<sup>13</sup> All three forms of drafting multilingual legislation are found in Switzerland, although co-revision is most common.

*Co-revision* means that the first draft is written in the working language of the individual or group responsible for this task, but the draft is translated into the other language(s) early so that the process of revision can be carried out for all language versions together.<sup>14</sup>

Co-revision allows for the first draft to be handed over to a specialized translator who will then discuss any ambiguities with the original drafter. The translator may be part of the drafter's administrative unit or belong to a specialized unit; private entities are rarely used. Often, the translators have a legal background. Because it happens early on in the process, translation improves the quality of drafting as it can still have an impact on the wording of the original text.<sup>15</sup>

The process of translation may be followed up by further reviews and revisions. On the federal level, an Internal Drafting Committee ("*Verwaltungsinterne Redaktionskommission*") reviews and revises the original draft as well as its translation into the other main language (German or French). For each draft, the Committee will be composed of a German-speaking and a French-speaking linguist from the Federal Chancellery and a German-speaking and a French-speaking lawyer from the Federal Office of Justice. In this bilingual setting, the Committee reviews all proposals for constitutional amendments, acts of Parliament and important secondary legislation. Its suggestions for the

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<sup>12</sup> FELIX UHLMANN/STEFAN HÖFLER, "Professional Legislative Drafters – New Ideas for Switzerland?", in Felix Uhlmann (ed.), *Professional Legislative Drafters, Status, Roles, Education*, (Dike: Zurich/St. Gallen, 2016), at 144.

<sup>13</sup> REBEKKA BRATSCHI/MARKUS NUSSBAUMER, *Mehrsprachige Rechtsetzung*, in Ekkehard Felder/Friedemann Vogel (eds.), *Handbuch Sprache im Recht*, De Gruyter, Berlin/Boston, 2016 at 371ff.; STEFAN HÖFLER/MARKUS NUSSBAUMER/HELEN XANTHAKI, "Legislative Drafting," in Ulrich Karpen/Helen Xanthaki (eds.), *Legislation in Europe, A Comprehensive Guide for Scholars and Practitioners*, (Hart: Oxford/Portland, Oregon, 2017) at 159ff.

<sup>14</sup> See URS ALBRECHT, *Die mehrsprachige Redaktion in der Bundesverwaltung*, LeGes 2001/3 at 99 ff.; ANDREAS LÖTSCHER, above n. 8 at 384 f.; GEORG MÜLLER/FELIX UHLMANN, *Elemente einer Rechtssetzungslehre*, 3. ed., Schulthess, Zurich/Basel/Geneva, 2013, note 162 f.; RAINER J. SCHWEIZER/JÉRÔME BAUMANN/JAN SCHEFFLER, above n. 7 at 31.

<sup>15</sup> GEORG MÜLLER/FELIX UHLMANN, above n. 14, note 163; RAINER J. SCHWEIZER/JÉRÔME BAUMANN/JAN SCHEFFLER, above n. 7 at 33f.

German and the French versions of the text are drafted in parallel within the commission, which means that from this point on, one can no longer call one of the language versions the "original" and the other the "translation".<sup>16</sup>

*Co-drafting* from the very start is less common in Switzerland, but some cantons and the Confederation have repeatedly applied it. The canton of Berne has tested two different forms. In some cases, laws were jointly drafted in both languages by a group composed of one German and one French speaking civil servant (or one bilingual civil servant) – which would be the typical form of co-drafting. In another case, the revision of the cantonal constitution, two independent drafts were written in German and French, translated and then compared to each other.<sup>17</sup>

*Co-editing* means that a draft is prepared in one language and is only translated for final editing. This process is found for translation into Italian (federal level)<sup>18</sup> and Italian and Romansh (Grisons)<sup>19</sup> but otherwise, it is not typical for Switzerland because a draft law usually must first pass an internal review by other administrative units (or at least the units concerned) and must then be published for consultation by the public. Internal and external consultations require translation, which means that a draft going to Parliament will have passed the translators' office already three times. This gives ample room for correction based on the feedback of translators. There are fewer safeguards in the parliamentary phase, but at least on the federal level the bicameral system ensures some time for proper translation (and the benefits that may come from it).

It is interesting to see that the majority language tends to be overrepresented as the language of first drafts. In the canton of Berne, for instance, one would expect roughly one tenth of first drafts to be written in French but it seems that almost 99 percent are in fact prepared in German.<sup>20</sup> On the federal level, the data are less conclusive but a recent study shows that less than ten percent of first drafts were written in French and none in Italian – simple proportionality would suggest these numbers to be much higher. Yet, a substantial number

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<sup>16</sup> For more details see URS ALBRECHT, above n. 14 at 99ff.; ANDREAS LÖTSCHER, above n. 8 at 384ff.; RAINER J. SCHWEIZER/JÉRÔME BAUMANN/JAN SCHEFFLER, above n. 7 at 32ff.

<sup>17</sup> For more details see GÉRARD CAUSSIGNAC, *Mehrsprachige Rechtsetzung*, ius.full 2006 at 154ff.; GÉRARD CAUSSIGNAC, *La rédaction législative bilingue dans le canton de Berne*, LeGes 2001/3 at 59ff.; GÉRARD CAUSSIGNAC/DANIEL KETTIGER, *Rédaction parallèle au Canton de Berne/Koredaktion im Kanton Bern*, LeGes 1991/3 at 77ff.; PHILIPPE GERBER, *Rédaction bilingue d'une Constitution cantonale. L'exemple du projet de Constitution bernoise*, LeGes 1992/3 at 75ff.

<sup>18</sup> JEAN-CHRISTOPHE GEISER, *La rédaction multilingue en Suisse*, in Charles-Albert Morand (ed.), *Légistique formelle et matérielle*, Presses Universitaires D'Aix-Marseille, Aix-en-Provence, 1999 at 213; RAINER J. SCHWEIZER/JÉRÔME BAUMANN/JAN SCHEFFLER, above n. 7 at 31ff.

<sup>19</sup> For more details see WALTER FRIZZONI, *Die mehrsprachige Gesetzesredaktion im Kanton Graubünden*, LeGes 2001/3 at 85ff.

<sup>20</sup> GÉRARD CAUSSIGNAC, *Mehrsprachige Rechtsetzung*, above n. 17 at 155.



of first drafts were composed in more than one language (one sixth), which might lead to a more balanced result if taken into account.<sup>21</sup>

One may assume that the dominance of the majority language is explained by factors outside the sphere of drafting, such as the composition of the work force of civil servants. Still, one should keep in mind that the formally equal treatment of languages in the process of co-revision may easily lead to a first draft in only one language in practice.

### **Qualitative Effects**

It is interesting to see that the need for translation is widely regarded as a benefit in Switzerland. Articles in law reviews may be somewhat biased in this point and not properly represent the burdens of the daily work with translations, but it is noticeable that there is hardly any critique of translation. It is safe to assume that a lot of drafting flaws are detected during translation.

One important prerequisite for translation to have such positive effects is that there is sufficient feedback from the translators. This means not only that in case of doubt the translator should come back to the drafter but also that the drafter should read the translation to make sure that his or her draft was properly understood. Any mistranslation might provide important pointers to passages in the original draft that need revision: if the translator got it wrong, other readers may too. Similar discrepancies may also be detected during public consultation when it turns out that the participants have understood a governmental proposition differently.<sup>22</sup>

However, at the federal level, this form of check and double-check mainly works for the two major languages (German and French). Translations into Italian usually come very late in the process and tend to be somewhat neglected.<sup>23</sup> It is maybe telling that the benefit of translations is generally praised and that the only ones that have attracted some concerns stem from the canton Grisons. This trilingual canton has traditionally attained high drafting standards – but it seems that translations come very late in its legislative process and that they pose rather a problem than a benefit.<sup>24</sup> Of course, to be fair, one should also keep in mind that it is quite a burden for a small canton to translate every legal norm into two further languages, which, moreover, are only spoken by roughly 50,000 inhabitants (in total, not each).

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<sup>21</sup> BARBARA GRÜTER, *In welcher Sprache entstehen die Gesetze des Bundes?*, LeGes 2015/2 at 354ff.

<sup>22</sup> See JÉRÔME BAUMANN/ARNO BERTHER/MARCO BORGHİ/PIA JANCZAK/ANDREAS LÖTSCHER/GIANPIERO RAVEGLIA/FEDERICA DE ROSSA GISIMUNDO/JAN SCHEFFLER/RAINER J. SCHWEIZER, *Mehrsprachige Gesetzgebung in der Schweiz: Thesen und Empfehlungen*, in Rainer J. Schweizer/Marco Borghi (eds.), *Mehrsprachige Gesetzgebung in der Schweiz*, Dike, Zurich/St. Gallen, 2011 at 390; RAINER J. SCHWEIZER/JÉRÔME BAUMANN/JAN SCHEFFLER, above n. 7 at 34.

<sup>23</sup> RAINER J. SCHWEIZER/JÉRÔME BAUMANN/JAN SCHEFFLER, above n. 7 at 31.

<sup>24</sup> See WALTER FRIZZONI, above n. 19 at 87.

It may also be added that all reports from co-drafting univocally describe positive experiences. Co-drafting is officially recommended by the federal drafting manual ("*Gesetzgebungsleitfaden*").<sup>25</sup> Even if one presumes that usually only very experienced drafters have taken part in such projects, and hence the good results may also be explained by a positive selection process, the necessity to think of a problem in more than one language is a distinctive benefit. Unfortunately, in times of more limited administrative resources and increasing as well as cursory production of norms, these benefits tend to get neglected.

There is another external development posing a possible threat to the positive effects of co-revision. Traditionally, Swiss students learn at least one other national language, meaning that the German-speaking students learn French and that the French-speaking students learn German, often as their first foreign language. Not surprisingly, this tradition has come under pressure as employers (and students) rank English much higher than French or German. Still, Swiss civil servants are quite knowledgeable of a second language (and may even consider a bilingual working place as distinctively attractive), which ensures that there is sufficient exchange between drafters and translators and between drafters speaking different languages. If the level of knowledge of a second national language will drop, so will the benefits from co-revision.

### Quantitative Effects

There is little study of whether the "burden" of translation influences the quantity of new norms produced. In 2015, a study conducted for the canton of Grisons found a significant disparity among the amounts of legislation produced by the Swiss cantons.<sup>26</sup> The study looked not only at the absolute amount of norms in a canton, but also at the stability of the legislation over time. For this purpose, all norms were classified as belonging to the constitutional, the legislative (Parliament) and sub-legislative level (Government).

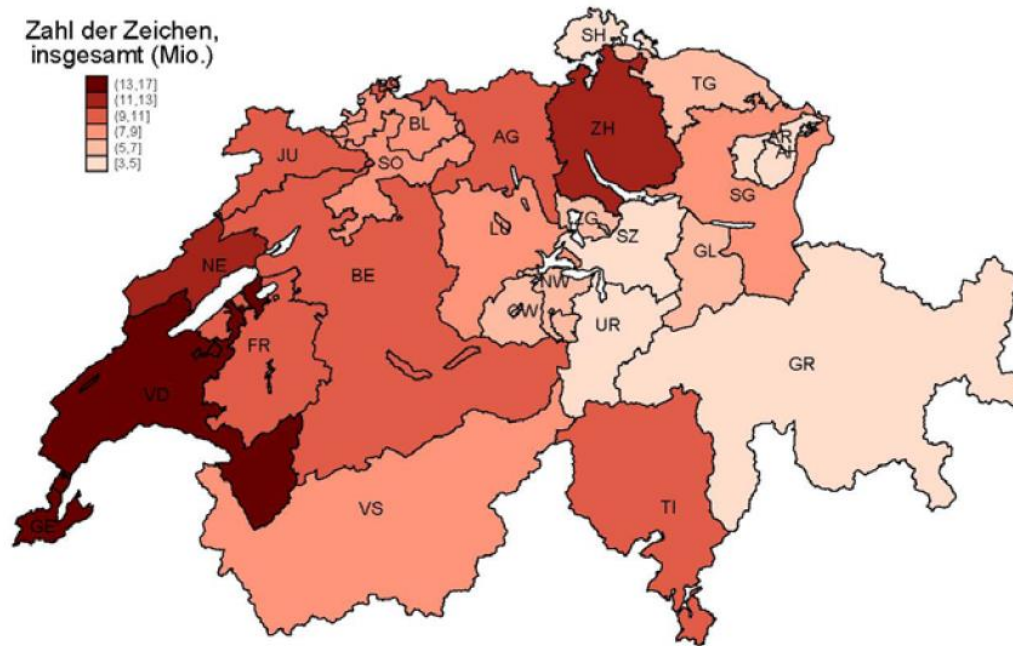
If one looks at the number of characters that make up the corpus of laws of each canton, one can easily see that the canton of Geneva (GE) has roughly four times as many norms as some rural cantons (cf. Fig. 2). Disparities are most plausibly explained by size of the canton (the bigger the more) and its legislative tradition (once many laws, always many laws). It is also evident that French-speaking cantons have a larger amount of legislation than the rest of

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<sup>25</sup> Gesetzgebungsleitfaden des Bundesamtes für Justiz, Leitfaden für die Ausarbeitung von Erlassen des Bundes, 3. ed., Berne, 2007, note 997.

<sup>26</sup> SIMON LÜCHINGER/MARIUS ROTH/MARK SCHELKER/FELIX UHLMANN, Qualitätsmessung der Rechtsetzung im Kanton Graubünden, (Empirische Grundlagen, Phase I), Lucerne/Fribourg/Zurich, 2015, <https://www.rwi.uzh.ch/de/oe/ZfR/forschung/projekte/p02.html>. See also SIMON LÜCHINGER/MARK SCHELKER, 2016, Regulation in Swiss Cantons: Data for One Century, CESifo Working Paper, Nr. 5663, <<https://ssrn.com/abstract=2719532>>; FELIX UHLMANN, Wer hat und wer macht wie viel? – Rechtsbestand und Rechtsetzungsaktivität in den Schweizer Kantonen, LeGes 2017/2 at 371ff.

Switzerland. (The factor that French and Italian texts are somewhat longer due to linguistic reasons does not play a major role; at the federal level it counts for under 5 %).<sup>27</sup>



**Figure 2:** Number of characters used in cantonal legislative texts (mio.), SIMON LÜCHINGER/MARIUS ROTH/MARK SCHELKER/FELIX UHLMANN, above n. 26 at 14.

The data are inconclusive on the question whether the need for translation reduces the number of norms. One might say that the large canton of Berne has fewer norms than Zurich, maybe because of the need for translation. Also, Valais and Fribourg seem to have fewer norms than Geneva, Vaud and Neuchâtel, but this may as well be explained by their proximity to the German-speaking part of Switzerland. Grisons, the largest canton area-wise, but lightly populated, is reluctant to produce norms, but this again might be due to tradition and the population size. Hence, it must remain speculative whether translation has fostered (or hindered) the production of norms in Switzerland. It is certainly not a decisive factor.

There are, unfortunately, no studies on the duration of the legislative process if a text has to be translated. Experience und manuals on the legislative process suggest that it indeed influences the time lime of a project,<sup>28</sup> but is probably not a decisive factor. Translation often goes hand in hand with other necessary checks. It should also be noted that the legislative

<sup>27</sup> SIMON LÜCHINGER/MARIUS ROTH/MARK SCHELKER/FELIX UHLMANN, *ibid.* at 6.

<sup>28</sup> See, for example, Gesetzgebungsleitfaden des Bundesamtes für Justiz, above n. 25, note 999.

process is still comparatively slow (but accelerating) in Switzerland, so that the time for translation is hardly felt.

*In conclusion, translations are a benefit to the legislative process but only if properly embedded in the process and if there is a real exchange between translators and drafters.*

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